# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 22, 2001 |
| v | No. 219893<br>Saginaw Circuit Court |
| KIM GERALD MARTIN,<br><br>Defendant-Appellant. | LC No. 98-016266-FC |

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced to life imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because the prosecutor, in his closing argument, stated that defendant did not ask an eyewitness to call for medical assistance, even though the eyewitness testified at the preliminary examination that defendant told him to do so. We disagree.

This issue was not properly preserved for appeal because the defendant failed to object to the alleged prosecutorial misconduct at trial, *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996), thereby waiving review unless there has been plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To determine whether a prosecutor has committed misconduct, this Court must review the relevant portions of the record and consider the prosecutor's remarks in the context used. *McElhaney*, *supra* at 283. The test of prosecutorial misconduct is whether the defendant has been deprived of his right to a fair and impartial trial. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993); *McElhaney*, *supra* at 283. This Court reviews alleged prosecutorial misconduct during closing arguments for harmless error. *People v Mezy*, 453 Mich 269, 285; 551 NW2d 389 (1996). An error is harmless when it appears from the record that it is highly probable that the error did not contribute to the verdict. *People v Mitchell (On Remand)*, 231 Mich App 335, 339; 586 NW2d 119 (1998).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence in the case. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, the facts at trial showed that defendant told the eyewitness to call the police, not the hospital or an ambulance. During closing arguments, the prosecutor pointed out to the jury that there was no evidence presented at trial that defendant told anyone to call for medical assistance and that this was evidence of defendant's intent to kill. The prosecutor was simply restating the facts as they were developed at trial. During closing argument, a prosecutor is allowed to argue reasonable inferences from the evidence. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). Moreover, defendant has failed to show that the prosecutor was aware of the testimony given during the preliminary examination or that he took advantage of defense counsel's failure to elicit that testimony, because this prosecuting attorney did not appear at the preliminary examination.

More importantly, we conclude that the alleged error did not contribute to defendant's second-degree murder conviction because there was ample evidence to show that defendant intended to kill, intended to cause great bodily harm, or intended to do an act in a wanton and wilful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998), citing *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980).

Additionally, defendant could also have been convicted of second-degree murder under an aiding and abetting theory if (1) the murder was committed by defendant or another, (2) defendant performed acts or gave encouragement that aided or assisted the crime, and (3) defendant intended its commission or had knowledge that the principal intended its commission. *People v Spearman*, 195 Mich App 434, 441; 491 NW2d 606 (1992), rev'd in part by *People v Rush*, 443 Mich 870; 504 NW2d 185 (1993). Under this theory, the jury could have reasonably concluded that defendant or codefendant fatally beat the victim, defendant summoned codefendant from his home to participate in the beating, and defendant either intended the victim to die or knew codefendant intended the victim to die because defendant stood by and watched codefendant jump on the already unconscious victim's head five to seven times. Moreover, there was evidence that defendant continued to kick the victim in the head while codefendant was jumping on the victim's head. The jury could easily have convicted defendant on this evidence, without any alleged improper comment by the prosecutor that defendant did not tell anyone to call an ambulance.

We also conclude that any alleged prosecutorial misconduct was cured when the trial court instructed the jurors that they must determine the facts of the case, that the attorneys' statements and arguments were not evidence but only meant to help the jurors understand each side's legal theories, and that they should only accept attorneys' statements that were supported by the evidence or by common sense.

Defendant next argues that he was denied a fair trial because the court gave the jury a supplemental instruction that did not include the defense of mere presence. We disagree. This Court reviews claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998).

Instructions that are somewhat imperfect are acceptable if they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Generally, when a jury asks for supplemental instructions, a trial court is only obligated to give those instructions specifically asked for. *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978).

The jury specifically asked the trial court if it had to determine whether *the defendant's kicks* killed the victim. The jury specifically requested further instruction on the issue of causation for second-degree murder. Because the jurors referenced the specific instruction they were considering, and because they asked if defendant's kicks had to have caused death, it is clear that they were trying to determine if defendant committed second-degree murder based on an aiding and abetting theory. In response to the jurors' question, the trial court properly determined that a supplemental instruction was necessary to guide the jury in its deliberations. The trial court was not obligated to go beyond the jury's request for further instruction. *Darwall*, *supra* at 663.

Moreover, defendant failed to request an instruction on the defense of mere presence and has therefore waived this argument for appeal. *People v Boykins*, 18 Mich App 356, 357; 171 NW2d 53 (1969); *People v Sabin* (*On Second Remand*), 242 Mich App 656; 620 NW2d 19 (2000).

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to elicit the fact that he told an eyewitness to call for medical assistance and when his attorney failed to request an involuntary manslaughter instruction. We disagree. This Court reviews effective assistance of counsel issues de novo. *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000). Defendant failed to preserve this issue for appeal because he did not move for a new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Therefore, our review is limited to the existing record. *Id*.

To establish a claim for ineffective assistance of counsel, a defendant must show first, that his attorney's performance was deficient under an objective standard of reasonableness, and second, that there is a reasonable probability that, but for the deficiency, the jury would not have found the defendant guilty. *Snider*, *supra* at 424, citing *Pickens*, *supra* at 298. An attorney is presumed to provide the effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

Defendant first argues that he was denied the effective assistance of counsel when his attorney failed to elicit that he asked the eyewitness to call for medical assistance because this testimony would have shown that defendant did not have the intent to kill. As discussed *supra*, there was a magnitude of evidence that defendant intended to inflict great bodily harm on the victim that was likely to cause death; therefore, even if the jury had known that defendant asked the eyewitness to call for medical assistance, the outcome, in all probability, would have been the same. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to request a lesser included involuntary manslaughter instruction. This argument is also without merit. The evidence showed that defendant repeatedly and violently kicked the

victim in one of the most vulnerable places on a person's body – the head. Additional evidence showed that defendant continued to kick the victim even after he was knocked unconscious. The evidence did not support a request for involuntary manslaughter. Therefore, defendant's argument that he was denied the effective assistance of counsel is without merit.

Defendant finally argues that he was denied his right to a proper jury selection process because the trial court used a selection process that is not permitted under Michigan law. We disagree. Defendant failed to preserve this issue for appeal because he failed to object to the jury selection process or express dissatisfaction with it at trial. *People v Tyburski*, 196 Mich App 576, 583 n 5; 494 NW2d 20 (1992); *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Therefore, we review this issue for plain error. *Carines*, *supra* at 764. To avoid forfeiture under this rule, a plain error must have occurred that affected defendant's substantial rights. *Id*. at 763. Plain error includes clear and obvious errors. *Id*.

Generally, the defendant bears the burden of showing prejudice that affected the outcome of the lower court proceeding. *Carines*, *supra* at 763. However, given the fundamental nature of the right to trial by an impartial jury and the inherent difficulty of evaluating such claims, requiring a defendant to show prejudice imposes an often impossible burden and a defendant is entitled to have a jury selected as provided for by court rule. *People v Green* (*On Remand*), 241 Mich App 40, 43-44; 613 NW2d 744 (2000).

MCR 2.511(A)(2) provides that in an action that is to be tried before a jury, the names or corresponding numbers of the prospective jurors must be deposited in a container, and the prospective jurors must be selected for examination by a random blind draw from the container. MCR 2.511(A)(2). However, MCR 2.511(A)(4)[1] states, "Prospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." *Id*. Our Supreme Court now embraces the notion that "rules of automatic reversal are disfavored." *People v Mosko*, 441 Mich 496, 502; 495 NW2d 534 (1992); *Green*, *supra* at 46. However, selection of a jury using a "struck jury method," or any method patterned after it, cannot be used. *Green*, *supra* at 46. Pursuant to MCR 2.511(A)(4), no error is committed if the jury selection method was fair and impartial. *Green*, *supra* at 48; MCR 2.511(A)(4). This rule only guarantees a fair trial, not a perfect one. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988).

We believe that the trial court satisfied the mandates of MCR 2.511(A)(2) because the prospective jurors were randomly selected and given identifying juror numbers in a random fashion. *Green*, *supra* at 47. The jury selection process used in this case was not a "struck jury method" or method patterned after it because both attorneys were allowed to challenge the potential jurors for cause or use a peremptory challenge to attempt to mold their jury. Moreover, the selection process used here is very similar to the method used in *Green*, *supra* at 42-43, where this Court held that that method was not a "struck jury method." *Id*. at 47.

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[1] Both MCR 2.511(A)(2) and (A)(4) apply to the jury selection process in criminal cases. MCR 6.412(A).

Although we believe that the trial court's jury selection method may have impinged on the element of randomness because of the method's predictability in which a prospective juror would replace a struck juror, *Green*, *supra*, at 47, we hold that the flaw was not fatal to a fair and impartial trial. *Id.* at 47-48. The identity of the next potential juror could not have been positively known because it is highly probable that some potential jurors had deferred service until a later date or were excused for some other reason.

Despite our conclusion that the selection procedure was fair and impartial in the instant case, we instruct the Saginaw Circuit Court not to employ this system in the future. MCR 7.216(A)(7). The element of predictability, however slight, should be eliminated from the selection process to ensure that randomness is preserved and protected to the fullest degree. *Id.* at 48.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin